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PBS MACNEIL/LEHRER NEWSHOUR
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>LIBEL SUIT/>MACNEIL: Yesterday was the midway point in the historic <>WESTMORELAND>libel trial between CBS and Gen. William Westmoreland. Yesterday, after 13 weeks in federal court in Manhattan,

Westmoreland's lawyers rested their case, and CBS lawyers began their defense. Tonight, we devote our lead focus section to the case with the principal lawyers for both sides. Gen. Westmoreland claims that a 1982 CBS documentary, 'The Uncounted Enemy: A Vietnam Deception,' falsely charged him with suppressing higher enemy troop counts in reports to his superiors in Washington, including President Lyndon Johnson. The general is suing the network for $120 million. Before we talk to the two sides, we have a summary of the case made against CBS over the past three months. Our correspondent is June Massell.

GEN. WILLIAM WESTMORLAND (January 1982): I have asked for nothing in the past, but I do ask for something today, fairness. I do not expect it from CBS, but I know I shall get it, fairness, from the American people.

MASSELL: Gen. William Westmoreland, three years ago, after the CBS documentary aired. But today, fairness is not the issue. In fact, the test for libel has little to do with fairness. The issue before the jury examining CBS's documentary, 'The Uncounted Enemy: A Vietnam Deception,' is not whether the program was fair or unfair, not even simply true or false. The issue before the jury is far more complicated. In order to win, Gen. Westmoreland must prove two things--first, that the program was false, and second, that CBS knew it was false. In other words, if the program was false but CBS thought it was true, then CBS is not guilty of libel.
MIKE WALLACE (CBS documentary): The fact is that we Americans were misinformed about the nature and the size of the enemy we were facing. And tonight, we're going to present evidence of what we have come to believe was a conscious effort, indeed a conspiracy at the highest levels of American military intelligence, to suppress and alter critical intelligence on the enemy in the year leading up to the Tet offensive.

MASSELL: The broadcast says the U.S. military command in Vietnam, which was headed by Gen. William Westmoreland, deliberately underreported enemy strength figures to Washington in order to appear to be winning the war, a charge Westmoreland has spent three months in court attempting to refute. If a jury agrees that the program is false, how does it then decide CBS knew it was false? The judge says they must look into the producer's state of mind at the time he prepared the documentary and then decide if the network willfully or purposely lied. To make the case that CBS's state of mind led it to recklessly disregard the truth, Westmoreland has relied heavily on outtake in the trial, pieces of filmed

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interviews which were not shown in the documentary. As a result, CBS has been put in the ironic position of having to defend what it did not air as well as what it did. In fact, this case has focused attention on outtakes as no other libel case in American history has. The courtroom is equipped with 10 television monitors. And the judge uses television jargon when he asks for tape to be cued. To lay the groundwork that CBS lied, Westmoreland's attorney, Dan Burt, used outtakes to try to prove that CBS was biased against his client. One of Burt's contentions is that CBS coddled friendly witnesses and hounded unfriendly ones such as Westmoreland. Here's an unused excerpt of Mike Wallace's interview with Gen. Westmoreland that Burt showed in court.

WESTMORELAND: This is not an issue, Mike. WALLACE: Well, here is the issue. WESTMORELAND: I made the decision. It was my responsibility. I don't regret makin' it. I stand by it. And the facts prove that I was right. Now, let's stop it.

MASSELL: On the stand, Westmoreland testified that he had been rattlesnaked and that he had participated in his own lynching. 'They wanted to go for my jugular,' he told the jury. Burt contrasted Westmoreland's treatment by CBS with that of George Allen, the CIA's No. 2 man in Vietnam who helped build CBS's thesis in the documentary. Burt said Allen had been coached, in fact, interviewed twice by CBS. And he reminded the jury that Sam Adams was present during the interview, a paid consultant to CBS and a former CIA analyst and old protege of George Allen's. VOICE OF GEORGE CRILE: George, would you please help your old protege, Sam Adams, here, in some way? He is, he has one vision, which, as you know, has always been terribly focused and, ah, and very clear and not complicated.

MASSELL: In the outtakes, Allen turned several times to Sam Adams for advice. GEORGE ALLEN (laughing): What happened, Sam?

DAVID ZUCCHINO (Philadelphia Inquirer): I think the jury was very im, impressed by that, especially having seen the outtakes of Graham and Westmoreland, where they didn't have that kind of help.

MASSELL: David Zucchino is a reporter for the Philadelphia Inquirer. He has been covering the trial from the beginning.

MASSELL: Is there an impression that CBS coddled friendly witnesses and hammered unfriendly ones? ZUCCHINO: Yes. I think that came across very clearly, especially in the outtakes. But I'm not at all convinced that that has any direct bearing on proof of reckless disregard for the truth, which is....

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MASSELL: Because... ZUCCHINO ...what Westmoreland has to prove. It may prove imbalance. Or it may prove a desire by CBS to, to hammer people they thought were hostile to them. But I do not think Burt has laid a case that this was reckless disregard for the truth.

MASSELL: Because the editing process could be crucial in determining CBS's state of mind, it has been examined throughout the three months of trial. In all, Burt showed substantial portions of nine interviews, including this one that Mike Wallace did with Gen. Westmoreland. First, a portion of what ran in the documentary.

WALLACE: Was President Johnson a difficult man to feed bad news about the war? WESTMORELAND: Well, Mike, you know as well as I do that people in senior positions love good news. Politicians or leaders in countries are inclined to, to shoot the messenger that brings the bad news. Certainly, he wanted bad news, ah, ah, like a hole in the head.

MASSELL: After playing that, Burt turned to the jury and said, quote, 'As you just saw, Gen. Westmoreland seemed to agree with Mike Wallace. And so, we, the viewers, believed that indeed he gave the president what he wanted to hear, mostly good news, but that isn't the whole of what Gen. Westmoreland told Mr. Wallace,' end quote. Next, Burt played the outtake, the continuation of the answer that CBS had cut, part of which came after the film ran out.

WESTMORELAND: He welcomed good news. Ah, but he, he was given both the good and the bad. But he was inclined to accentuate the positive.

MASSELL: Burt gave the jury another example of how he believed CBS twisted the truth, an excerpt from an interview done with Col. Gaines Hawkins, the military's leading expert on the Viet Cong. Once again, first, what appeared in the documentary.

COL. GAINES HAWKINS: There was never any reluctance on my part to tell Sam or anybody else who had a need to know that these figures were crap. They were history. They weren't, they weren't worth anything.

MASSELL: In the documentary, it seemed as though Hawkins was referring to Westmoreland's enemy figures as crap. The outtake showed that Hawkins was referring to old South Vietnamese estimates.

HAWKINS: Now proud of this, when we had the old figures that we inherited from the South Vietnamese forces, ah, there was never any reluctance on my part to tell Sam or

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anybody else who had a need to know that these figures were crap.

MASSELL: Burt capitalized on that by telling the jury they could see how Crile had dropped the first 18 words in order to fabricate the meaning of Hawkins' answer. In addition to showing outtakes, Burt has brought in 19 witnesses, many of whom did not appear in the documentary. Some, like Walt *Rostow and Robert McNamara, had been advisers to President Johnson during the Vietnam era. They supported Westmoreland's thesis that the books had not been cooked. The last witness and perhaps the most interesting was Ira *Klein, the principal film editor for the CBS program. Klein told the jury he had complained about the fairness and accuracy of the documentary as he was editing it. Klein also said Sam Adams, CBS's key consultant and former CIA analyst, told Klein, quote, 'We have to come clean. The premise of the show is inaccurate.' CBS Attorney David Boies tried to undermine Klein's testimony by pointing out that Klein had not read the research used for the documentary, not attended any of the interviews and never written a story himself. Because of all the controversy over how the show was edited, we asked Floyd Abrams, an expert on libel law, what legal relevance editing decisions might have. FLOYD ABRAMS (libel law expert): I think that the judge has been very clear with the jury so far and is likely to continue to be very clear with the jury. But they have to be very careful not to pass editing judgments on CBS. The jury, in short, is not a super editor. The jury is, does not exist to say, 'You know, we just don't think this program was fair.' The question is not would I, as a juror, have edited the program the way CBS did. The question is did, did CBS believe it was editing in a proper way?

MASSELL: Ultimately, the jury has a difficult task. It must decide whether the interviews that were left out of the documentary and the editing judgments made by CBS amounted to a reckless disregard for the truth. The jury must walk a fine line between what may seem unfair and what's false.

ABRAMS: All that isn't easy. And one of the problems we've had in the libel field in the past is that jurors tend to be intuitive. Jurors tend to do what they think the right thing is. And so, if there's a story which is broadcast or printed which a jury thinks isn't true, the tendency of the jury is to say, 'Well, there's something wrong there. The press oughta pay.'

MASSELL: The real question is will the jury obey the judge's instructions? Will they understand that fairness doesn't count? What we've shown you are highlights from Westmoreland's case. CBS began its case yesterday. Their

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first witness, Sam Adams, takes the stand tomorrow. Sometime after that, Mike Wallace will testify. The trial is expected to last another six weeks.

MACNEIL: And when CBS finish (sic) presenting its case, we will summarize that one. As I said, we have with us the lead lawyers for both sides in this trial, for Gen. Westmoreland, Dan Burt, and for CBS, David Boies. Mr. Boies, let's start with you since we've been hearing the other side for the last 10 minutes or so. Do you fear that the jury may do what Floyd Abrams just said they sometimes do in these cases, see something wrong and decide the press ought to pay? DAVID BOIES (CBS lawyer): It's always difficult, particularly when you're as close to a case as I am, ah, to try to predict what a jury will do. And I, I really don't think that's, ah, an appropriate thing for me to do. I think this jury has been particularly attentive, however. I think they've been particularly attentive not only to the evidence but to the judge's charge. And I would think, I certainly would hope, and given the kind of attention the jury has given to the case, I think they will do the right thing. I think they will listen to the evidence and listen to the instruction and imply, apply those instructions.

MACNEIL: Is fairness, in your mind, in fact, irrelevant in this case? BOIES: Well, I think that, legally, fairness is irrelevant to this case. I think that one of the things that we will do in the case, in part because it's been brought up by the plaintiff, is we will litigate the fairness. And I think CBS is quite prepared to litigate the fairness. I think...

MACNEIL: Explain what that means to laymen, to litigate the fairness. BOIES: Well, I think, well, for, for example, take the editing thing. One of the things that's very difficult about any television production is deciding what you edit in, what you edit out. For example: in the little 10-minute section that we just saw, ah, you took a portion of the Westmoreland. And there are three portions of the Westmoreland interview that follow one right after the other. One, Westmoreland says, 'It's tough to give bad news.' Second, he says, 'We gave both good news and bad news.' Third, he says, 'We emphasized the good news. We, including myself, Westmoreland, accentuated the positive.' Now, if you take just one, you may get one impression. If you take just two, you may get one impression, as was just done. If you take all three of them, I think you get the impression that taking either all three of them together or just the first one is a fair impression.

MACNEIL: Is your, is it in your view that the documentary was edited fairly? BOIES: Oh, absolutely, absolutely. I

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don't think that when you take the whole thing in context there's any question that the documentary was, was edited fairly. Take another example of editing, the other example that was shown in the introduction, where Hawkins is shown. Again, there are three parts to that answer. Hawkins says, 'When we inherited the figures, there was never any,' he goes on to say, 'there was never any doubt in my mind, and I told Sam that the figures were crap.' He then goes on to say what was crap were the end-result figures. That wasn't added in either when Mr. Burt put it in in the case or when this was edited just now. And what Hawkins also says is that the end-result figures that were taken by Westmoreland's people to the conference that he was talking about there, were exactly the same as the end-result figures that were inherited from the South Vietnamese. So that when you look at the entire thing in context, I think that you see it was very fairly edited.

MACNEIL: How did... BOIES: I don't think that's the legal issue, but I think, I think that comes into the case.

MACNEIL: Ah, the place where I wanted to come. How do you define the legal issue in this case, in the simplest way you can put it? BOIES: I think it was defined very well right at the beginning. It's, first, is the broadcast true, and second, did CBS believe the broadcast was true at the time that the broadcast was made. I think those are the two key legal issues.

MACNEIL: The Washington Post, ah, reporting on the trial, said today that the other side clearly has made a dent in your, the CBS armor. Do you agree with that? BOIES: I don't wanna debate with the Washington Post. (Boies chuckles)

MACNEIL: Before the trial began, you were quoted as saying that your goal wasn't merely to win but to prove truth. Is that still your goal? BOIES: I think so. I thin one of the things that we wanna do, even though we don't have the burden of proof, the plaintiff has the burden of proof, ah, we wanna prove truth, and we wanna prove that CBS believed it. And the reason we do is tactical. Ah...

MACNEIL: Do you want to prove that there was a conspiracy and that CBS was right in reporting it? BOIES: Oh, I think we've gone very far in doing that already. I think that even though the plaintiff has the burden of proof, we're not just gonna sit back and say the plaintiff hasn't proved its case. We're setting out affirmatively to demonstrate not only that the broadcast was true and not only that CBS believed it but that the facts are there that demonstrate both of those propositions.

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MACNEIL: Let's bring Mr. Burt into this. First of all, do you agree, is fairness irrelevant in this trial?
DAN BURT (Westmoreland attorney): You know, what's at issue when you get to a reporter's state of mind, producer's state of mind, which is the issues that's been described as recklessness or belief or malice in the law, you can't get inside that mind. Many cases, you might not want to. What you have to do is look at all the external indicia, and a pattern of prejudice, fairness, if you will, is one of the things you look at. And then, you measure up all those external indicia, and you say this person either could, is a liar or was recklessly indifferent to the truth or falsity of what they were saying. And so that, in that regard, fairness or a pattern of prejudice certainly is a factor. And we're not talking here about one element of bias. It's not a question solely of coddling. It's a question of reinterviewing people, showing them screenings in advance. I won't throw the question back to you, but I dare say in your career you have never taken an interviewee, filmed them, an interview with them, then taken them to see what other people say and then reinterview them on the same subject. The point is obvious--you're trying to load them up. And those kinds of things, that pattern of prejudice, is an issue in the trial.

MACNEIL: What's your comment on that? Do you agree that in that sense, fairness is relevant here? BOIES: I don't think fairness is relevant. I think what's relevant is whether the broadcast was true and whether CBS believed it. I think that in some cases, some of the same evidence may go to both of those issues. But take, for example, the specific example that Dan raises, which is the Allen interview. I think it is not even bad journalistic practice, let alone something that goes to the truth or falsity of a statement, to show one interviewee things that other people have said. Reporters are always coming up to me and saying, 'Have you seen the, this outrageous thing that Dan Burt says? What's your reaction to it?' And I, I don't think that that is, in any sense, something that affects either the journalistic quality or the fairness or the truth of the broadcast. I think also one thing that has to be taken into account is that the two interviews that Dan talks about, ah, ah, Dan's own witness, Ira Klein, who was mentioned in the introduction, says they're substantively the same, says the story didn't change.

MACNEIL: How do you react to the outrageous thing that Mr. Boies has just said? (Boies and Lehrer laugh) BURT: Well, you know, with a great deal of calm. (Boies and Burt laugh) I think it's simply that. It is outrageous. The distinction in the example he used, where reporters go up and say, 'Did you see the outrageous thing that X-

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said,' is that they are asking for the initial impression and a reaction to something that occurred. In the case of the Allen interview that I'm referring to, there was an interview about the things that had occurred and then a showing of what other people said about that same event. And so that the reaction, the second time around, and the way in which things were described and discussion could not be spontaneous and unrehearsed. I believe that when CBS guidelines asked, say that you must have spontaneous and unrehearsed interviews, that that's a real good rule. And you have to have an awfully good reason to disregard it. In fact, it seems to me one of the cardinal rules that decent journalists don't wanna break.

MACNEIL: Let's go to the trial itself for a moment. The Philadelphia Inquirer reporter, I'd like to give you an opportunity to respond to something that he said. He said that he didn't think you had laid a case, that this was reckless disregard for the truth. Do you want to comment on that? BURT: Well, it's hard to comment when I only get that little bit of section. And it looked to me as if he was talking about this coddling point and on that alone was there was a case. But, you know, people are free to disagree. The press, particularly Mr. *Zu/keen/o, I'm told, has reported this case very fairly, very accurately, and I think we'll have to wait for the jury to decide whether I've laid a case or not. When you're inside a fight like this, particularly one with all the, you know, the bread and circuses and the people sitting in the bleachers eating Cheerios and popcorn and screaming and yelling.

MACNEIL: Are they really, is that the atmosphere in this trial? BURT: No, from time to time, it really is a circus atmosphere, there's no question about it, outside of the litigants and the people themselves, who are very serious indeed.

MACNEIL: Of course, that case has attracted, obviously, very wide attention. The press has a particular one in this one. What do you think is at stake in this trial? BOIES: Well, I think there are probably a number of things at stake. I think a lot of them are peripheral. I think one of the things that is stake is sort of a historical sense of what happened in Vietnam. That's not really a legal issue in the case any more than the fairness of the CBS broadcast, in my view, is a legal issue, but that is something that is being affected. Robert MacNamara's testimony was the first sort of record testimony that he'd given on an important aspect of the Vietnam war. I think another aspect that is being tested, although again I think in a peripheral, nonlegal way, is the fairness of the broadcast. I think that is being debated by journalists and others. And whether or not

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that is a legal issue, what's coming out in court is grist for that particular debate. I think the most important thing that's at issue in the case is the issue, in terms of a legal issue, is what the reach and breadth of the libel laws are. Is this the kind of situation in which a jury is going to be invited, in effect, to re-edit every program, re-edit every newspaper article that somebody doesn't like or are we going to stick to what Floyd *Abrams indicated in the introduction was the more traditional law of libel?

MACNEIL: What do you think's at stake? BURT: I think it's man against the machine. It's that individual, the man on the street, against enormous organizations like CBS, protected by an extraordinarily generous law, the Sullivan rule and the law of libel. It's the question of whether an individual, in certain egregious instances, has the right to defend himself and to ask those who attack him in the media to be accountable. That's all. But that, and that's a very strong current in our society today. It's the same current that underlies the public reaction to this man Goetz who took a shot at some fellows on a subway.

MACNEIL: Do you think that the narrow technical legal test, as it stands at the moment, the Sullivan ruling, squares with public feelings about the media at present? BURT: Well, I'm not a pollster and I don't know. My own view is that it's a good rule, it's terribly onerous and difficult, but I think it's a necessary rule to protect freedom in a society like ours, as unpleasant as it may be, we have not attacked that rule in this case.

MACNEIL: You think it adequately serves the public interest, the rule? BURT: I think you have to have a major free press in a free, if you're going to have a free society, that's right. But you have to also have an accountable press, and that's the issue here.

MACNEIL: Mr. Boies? BOIES: I don't think there's any question about an accountable press in this kind of situation. And we ought not to lose sight of the fact that it wasn't CBS making these charges, these charges were made by eight, 10, 12, 15 former intelligence officers, men from Westmoreland's own command, men who had absolutely nothing to gain by coming forward and making these charges. They're substantiated by contemporaneous documents. We talked about George Allen. George Allen was writing back in 1967 and 1968 that the enemy strength estimates that are at issue here were contrived, phony, deceitful. This is not something that in any sense sprang from George Crile's mind or from CBS. What CBS was doing, what George Crile was doing was reporting serious, substantiated charges by former intelligence officers, men

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with absolutely no incentive to make up these charges, charges that were furthermore supported by the contemporaneous documentation.

MACNEIL: Let me ask you this, if Gen. Westmoreland wins, presumably he is vindicated. BURT: That's right.

MACNEIL: If CBS wins, is CBS vindicated? BURT: That depends on the nature of the verdict. You have, it'll be a special verdict, probably, with various sections that the jury has to fill out and findings that they have to make on specific points, was the broadcast true or was it false, was CBS recklessly indifferent to the truth or falsity of what they said? And there's an interplay between those, so it's impossible to answer your question.

MACNEIL: I suppose I should have asked you first on this one. Can CBS come out of this with its authority and journalistic credibility intact? In other words, is it totally vindicated, even if you win? BOIES: Well, I think it will be vindicated. I think it's been vindicated. I think that the kind of scrutiny that has been given this broadcast has vindicated it now. I think there are very few pieces of journalism that could stand up to the kind of scrutiny, by not just one or two people taking a look at it, but the entire press scrutinizing every outtake, every piece of paper that was relied on, every internal memo, every offhand remark. I think there are very few pieces of either print or broadcast journalism that could have stood up that well under this kind of scrutiny.

MACNEIL: Do you have a final comment? BURT: If the other pieces of journalism are less able to withstand attack than this one, then you guys in the press are in real serious trouble.

MACNEIL: We have to leave it there. Mr. Boies, Mr. Burt, thank you for joining us. BURT: Thank you. BOIES: Thank you very much.

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